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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 307 OF 2016
WITH
CIVIL APPLICATION NO. 568 OF 2016
IN
SECOND APPEAL NO. 307 OF 2016**

Sou. Kisabai Pandurang Shelar and Others ... Appellants

Vs.

Sachin Bhiva Shirsat ... Respondent

Mr. D. D. Rananaware for the Appellants.

CORAM : GAURI GODSE, J.

DATE : 22nd JULY 2024

ORDER :

1. This Second Appeal is filed by the original plaintiff to challenge the concurrent judgments and decrees dismissing the plaintiff's suit for declaration and injunction. The suit was filed on the ground that the plaintiff has share in the suit property and that the suit properties are not yet partitioned by metes and bounds; hence, defendant no. 1 was not entitled to sell the suit property.

2. The suit is dismissed, and the First Appellate Court confirms dismissal of the suit in appeal preferred by plaintiff no. 2. However,

the present Second Appeal is filed by both the original plaintiffs. Plaintiff no. 1 is the wife of defendant no1. Plaintiff no. 2 is the son of defendant no.1's brother. Defendant no. 2 is the purchaser in whose favour defendant no. 1 has executed the sale deed in respect of his undivided share. Defendant no. 3 is the brother of plaintiff no.2.

3. Learned counsel for the appellants submitted that by way of amendment, the plaintiffs had claimed a declaration that the sale deed executed by defendant no. 1 was not binding upon their share. He further submits that once admittedly the plaintiff had a share in the suit property, both the courts ought to have granted at least limited relief of declaration that the sale deed executed by defendant no. 1 was not binding on the plaintiff's share.

4. Learned counsel for the appellants further submitted that the property described as property 1B was allotted in the name of defendant no. 1 and the father of plaintiff no.2 in the rehabilitation scheme. He thus submitted that the suit property could not have been sold without the necessary permission from the learned Collector. He, therefore, submits that the Second Appeal raises substantial question of law regarding whether the suit property could have been sold without permission of the Collector.

5. He further submits that the Second Appeal would also require consideration on the question of law whether the plaintiffs were entitled to a limited relief of declaration that the sale deed executed in favour of defendant no. 2 was not binding on the plaintiffs' share.

6. I have considered the submissions made by the learned counsel for the appellants. A perusal of the judgments of both courts indicates that the suit property described as 1-A is property allotted to plaintiff no.1 and defendant no. 1 under the Indira Aawas Scheme, and property described as 1-B is allotted to defendant no.1 and his brother, i.e. plaintiff no. 2's father under the Koyna Project Affected Persons rehabilitation scheme.

7. Admittedly, the suit properties are not partitioned by metes and bounds. Hence, the plaintiffs have their independent, undivided share in the suit property. The initial declaration was sought only with regard to the property described as 1-B; however, by way of amendment, a declaration was also sought in respect of properties subject matter of the sale deed by defendant no. 1 that it is not binding on the share of the plaintiffs.

8. After considering the facts and evidence on record, the trial court held that, admittedly, defendant no.1 had sold only his undivided share in respect of the suit property. The grounds raised

for challenging the sale deed with regards to defendant no. 1's property, that defendant no. 2 had illegally kidnapped defendant no. 1 under the influence of liquor for executing the sale deed, is disbelieved by both courts. Both courts have concurrently held that the plaintiffs were unable to prove that the sale deed was a hollow sale deed and executed without the free consent of defendant no.1.

9. Admittedly, defendant no. 1 has not sold out the entire suit property, and the sale deed is in respect of his undivided share. The trial court has thus correctly held that the co-owner is entitled to sell the undivided share. The trial court has further correctly held that plaintiff no. 2 has not claimed any preferential right to purchase defendant no. 1's share. Once it is admitted that only the undivided share of defendant no. 1 is sold, there was no reason to grant any declaration.

10. The First Appellate Court has also re-examined the pleadings as well as the evidence produced on record and confirmed the finding recorded by the trial court. Therefore, the first ground with regard to the declaration sought with regard to the sale deed not binding on the plaintiff's share is concerned; no consideration is required by this court as admittedly only the undivided share of defendant no. 1 is sold. So far as the second ground argued on

behalf of the appellants with regard to prior permission from the learned collector before alienating the property at 1-B is concerned, it was never the case of the appellants/plaintiffs that the sale deed was executed without any such permission. The said ground is thus based on facts, and it cannot be considered for the first time in a second appeal.

11. Both courts dealt with the plaintiffs' grounds of challenge, and concurrently, it was held that the sale deed executed by defendant no. 1 is a valid sale deed restricted to only defendant no. 1's undivided share. Thus, the grounds raised on behalf of the appellants would not require any consideration by this court, as it does not raise any question of law.

12. The second appeal does not raise any substantial question of law. Hence, the Second Appeal is dismissed.

13. In view of the dismissal of the second appeal, Civil Application No. 568 of 2016 is dismissed as infructuous.

[GAURI GODSE, J.]